STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Whitbeck, C.J., and Sawyer and Saad, J.J.

HERALD COMPANY, INC., d/b/a
BOOTH NEWSPAPERS, INC. and
THE ANN ARBOR NEWS,

Plaintiff-Appellant,

v.

EASTERN MICHIGAN UNIVERSITY
BOARD OF REGENTS,

Defendant-Appellee.

Supreme Court Case No. 128263

Court of Appeals Case No. 254712

Washtenaw County Circuit Court
Case No. GC-W-04-00001117-CZ

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BRIEF *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE BY THE REGENTS OF THE UNIVERSITY OF MICHIGAN, THE BOARD OF TRUSTEES OF WESTERN MICHIGAN UNIVERSITY, CENTRAL MICHIGAN UNIVERSITY BOARD OF TRUSTEES, SAGINAW VALLEY STATE UNIVERSITY, BOARD OF CONTROL OF MICHIGAN TECHNOLOGICAL UNIVERSITY, THE BOARD OF TRUSTEES OF OAKLAND UNIVERSITY, THE BOARD OF CONTROL OF NORTHERN MICHIGAN UNIVERSITY, AND THE BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY

/

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TABLE OF CONTENTS

TABLE OF CONTENTS

INDEX TO AUTHORITIES

MICHIGAN CASES **Page(s)**

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF THE BASIS OF APPELLATE JURISDICTION AND COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

The state universities appearing as amicus in this matter adopt by reference the statement of the basis of appellate jurisdiction and counterstatement of the questions presented articulated by Appellee Eastern Michigan University Board of Regents ("EMU") in its brief on appeal.

COUNTERSTATEMENT OF FACTS

The state universities appearing as amicus in this matter adopt by reference the statement of facts contained in EMU's brief on appeal.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE APPROPRIATE STANDARD OF REVIEW – THE CLEARLY ERRONEOUS STANDARD - IN THIS CASE.

In *Federated Publ'ns, Inc v City of Lansing,* 467 Mich 98 (2002), this Court clearly and succinctly set forth the appropriate standard of appellate review of a circuit court's decision regarding the potential application of exemptions under the Michigan Freedom of Information Act (FOIA), holding that "the application of exemptions involving legal determinations are reviewed under a de novo standard . . . [and] the clearly erroneous standard of review applies to the application of exemptions requiring determinations of a discretionary nature." *Id* at 106-07.

The Court of Appeals was unanimous in its recognition that application of the "frank communications" exemption in this case requires discretionary determinations by the circuit court and, as such, the clearly erroneous standard of review is the correct

standard to apply.[1] Indeed, an amicus appearing in support of Plaintiff-Appellant Herald Co ("Plaintiff") even recognizes the discretionary nature of the determinations the circuit court is called upon to make in applying the frank communications exemption and accepts the clearly erroneous standard as the correct level of review. (Br of Amicus Curiae Detroit Free Press at 2-3).

Plaintiff's argument on the issue of the applicable standard of review is two-fold: 1) that the Court of Appeals did not apply the clear error standard to the "nonfactual portions" of the letter, but instead applied the more deferential "abuse of discretion" standard; and 2) that a *de novo* review is to be made of the circuit court's application of the exemption to what Plaintiff characterizes as the factual portions of the letter in question.

As to the first of these arguments, the Universities believe that the Court of Appeals correctly used the clearly erroneous standard in its review of the circuit court's determination of the applicability of the frank communications exemption to the letter in question in this matter. In support of this position, the Universities rely upon and incorporate by reference the arguments ably and clearly set forth by Eastern Michigan University in its brief filed with the Court on September 21, 2005.

There is no legal authority to support the second argument advanced by Plaintiff. Its attempt to split the standard for appellate review of a circuit court's application of a single FOIA exemption to a single public record, in order to assign a *de novo* review to

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[1] Judge Whitbeck in his dissent agreed that *Federated* articulates a clearly erroneous standard of review. He diverges from the majority only with regard to his view of the correct outcome in applying that standard. *Herald Co v Eastern Michigan Univ Bd of Regents*, 265 Mich App 185, 221 *et seq* (2005).

specific portions of that record which Plaintiff baldly asserts to be purely factual, is baseless. *Federated* clearly instructs that in determining the appropriate standard of review, the focus is on the type of *exemption* sought to be applied,[2] not the type of *record* under consideration. *Federated,* 467 Mich 98 at 106-107. Use of the clear error standard is neither limited to only certain of the FOIA exemptions requiring discretionary determinations, nor to only certain portion(s) of the analysis of the applicability of those exemptions. Rather, *Federated* clearly and unequivocally held that "the clearly erroneous standard of review applies to exemptions involving discretionary determination." *Id* at 113. Plaintiff is assuming matters not established by the record in this case – that portions of the letter are purely factual and severable from the remainder of the document – to bootstrap to its argument for de novo review. In the end, the ultimate problem with this argument is that the factual/nonfactual content of the letter and the practical severability of such content are precisely the discretionary determinations to be made by the circuit court and to which deference is to be given.

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[2] Presumably, FOIA exemptions requiring legal determinations, to be reviewed under a de novo standard in accordance with *Federated*, might include the exemption for records or information specifically described and exempted from disclosure by statute, MCL 15.243(1)(d); information or records subject to the attorney-client privilege, MCL 15.243(1)(g); or records protected from disclosure by the federal family educational rights and privacy act of 1974 (FERPA) MCL 15.243(2). With regard to each of these exemptions, the circuit court would be required to determine whether "as a matter of law" the document in question is exempted from disclosure by statute, by the attorney-client privilege or by FERPA. By contrast, exemptions requiring discretionary determinations and to which the clear error standard of review applies would include the frank communications exemption at issue in this case, the exemption for records of a law enforcement agency at issue in *Federated*, MCL 15.243(1)(s), the privacy exemption, MCL 15.243(1)(a), or any other exemption where the circuit court must make factual determinations regarding the content of a record, severability of that content, and/or the appropriate balance of interests in disclosure versus nondisclosure of the record.

Plaintiff offers only one case, *Herald Co v City of Bay City*, 463 Mich 111 (2000), in support of its argument for *de novo* review of what it refers to as the "factual portions" of the record in question. *Bay City* does not provide the authority Plaintiff seeks. In *Bay City,* this Court was asked to review the application of the FOIA privacy exemption to a requested public record. Because the case was decided in the circuit court by summary disposition granted in favor of the defendants and raised a question of statutory construction, the Court determined at that time that a *de novo* review was appropriate. *Id* at 117.

Two years later, however, in *Federated*, this Court concluded that "a circuit court's decision regarding the applicability of exemptions to public records does not automatically require de novo review." *Federated,* 467 Mich at 106. Indeed, *Federated* reached this Court following summary disposition granted by the circuit court. *Federated Publ'ns, Inc v City of Lansing,* Docket Nos 218331, 218332, 2000 WL 33401843 (Mich App Nov 14, 2000) (*per curiam*). Nonetheless, this Court focused on the discretionary nature of the exemption under consideration and held the clear error standard, not the *de novo* standard, to be the correct standard of appellate review. *Federated,* 467 Mich at 106-07. As such, *Federated* is at least an implicit rejection of the ruling of *Bay City* that FOIA cases appealed after the grant or denial of summary disposition are automatically given *de novo* review. Further, as already discussed, *Federated* clarified the appropriate standard of review in cases applying FOIA exemptions and limited the need for *de novo* review to the application of exemptions requiring legal determinations.

For the foregoing reasons, the clearly erroneous standard of review applies to this Court's entire review of the availability of the frank communications exemption and that standard was correctly applied by the Court of Appeals.

II. THE CIRCUIT COURT CORRECTLY APPLIED §13(1)(m) OF THE FOIA, THE "FRANK COMMUNICATIONS" EXEMPTION, TO PERMIT WITHHOLDING OF THE ENTIRE LETTER IN QUESTION AND DID NOT CLEARLY ERR IN DOING SO.

A. The Letter in Question Satisfies the Criteria of the Frank Communications Exemption.

The FOIA exemption at issue in this case, the "frank communications" exemption, is found at MCL 15.243(1)(m). It permits a public body to exempt from disclosure:

> Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. . .

MCL 15.243(1)(m). The first part of the exemption requires the record to be: 1) within a public body or between public bodies; 2) other than purely factual; and 3) preliminary to a final agency determination of policy or action. The second part requires a balancing of interests as stated in the exemption.

Importantly, all four judges who have reviewed the letter in question, one at the circuit level and all three at the Court of Appeals, have been **unanimous** in determining that the letter from EMU's Vice President to a member of the board of regents met each

prong of the first part of the exemption.[3] No judge to have reviewed the letter in question has agreed with Plaintiff's argument, discussed more fully, *infra* at III, that any "purely factual" portions of the letter exist which must be separated out for disclosure.

B. The Record in This Case Shows That Plaintiff Has Accepted and Conceded EMU's Proofs Regarding the Actual Chilling Effect That Would Have Occurred In This Particular Instance Had the Letter's Author Known It Would Be Subject to Disclosure. EMU Has Met Its Burden In Showing That The Public Interest In Nondisclosure Prevails.

The only point of departure among the four judges to have reviewed the letter goes to the second part of the exemption, requiring a balancing of the public's interest in encouraging frank communications between officials and employees of public bodies and the public interest in disclosure. As to this second part only, Judge Whitbeck dissented from the majority in the Court of Appeals. In his view, the balancing of these competing public interests should be resolved in favor of disclosure. *Herald*, 265 Mich App at 216.

With due respect, in reaching the conclusion that the public interest in disclosure prevails here, Judge Whitbeck appears to rely upon unfounded "facts" to support both an increased public interest in disclosure and a decrease in the public's interest in frank communications between public administrators. As to the first, he asserts that a review of the Vice President's letter discloses that "all the facts are not in the public record." *Id* at 222. However, there is nothing to suggest that he availed himself of all sources within the public record – e.g., the reports of the board, its auditors, and all available media sources – in making such a sweeping pronouncement of what the "public record" pertaining to these events does not include. As to the latter, it is baldly stated by Plaintiff

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[3]In his dissent, Judge Whitbeck stated, "[t]he trial court found, and I agree, that the [vice president's] letter at issue here met each of these three prongs. The [balancing test] requirement is, however, another matter." *Herald,* 265 Mich App at 216.

and accepted by Judge Whitbeck that the Vice President had already decided to retire when he wrote the letter in question and, thus, no longer needed to remain in the good graces of his superiors. The Universities have carefully reviewed the record of competent evidence created at the trial court – the only record that is relevant to an appellate review of whether the trial court committed "clear error" in its decision – and find nothing to support either "fact" relied upon by Judge Whitbeck in his dissent.

However, the trial court record does include information critical to this Court's review of the lower court decision to apply the frank communications exemption. In its response to Plaintiff's expedited motion, EMU included the following information in an offer of proof: that the letter was written by an EMU vice president to a member of its board of regents; the regent requested the letter and asked the vice president to provide his opinion with respect to issues that had been raised regarding the University House project; the purpose of the letter was to assist the regent in determining the appropriate course of action for the board of regents to take during early stages of the controversy; the letter does contain the vice president's opinions related to certain issues; the letter also contains factual material, which was used to explain the author's opinions and positions; the letter was, in fact, used by the board in its deliberative process to determine its course of action; included in the letter are opinions and comments that reflect on the vice president's immediate supervisor, EMU's president; if the vice president knew that his letter would be made public, he would have been much more likely to be circumspect

and cautious in his communication. (Def's Resp to Pl's Mot at 12-15, Appendix of Def-App EMU Bd of Regents at 78b-81b[4]).

The substance of EMU's offer of proof was conceded and accepted as fact by Plaintiff before the circuit court. Plaintiff referred to the foregoing offer of proof by EMU as its "context" argument (Pl's Reply Br in Supp of Emergency Mot to Compel at 6, Appendix, p 88b), and at oral argument counsel for Plaintiff conceded the substance of EMU's proofs, stating:

> I don't challenge the offer of proof they've put in regarding the context of the letter except so far [sic] they attempt to make conclusions about whether the letter contains fact or opinion – that's really for this Court to decide – and all that's needed here is an in camera review of the single document.[5]

(Tr of 2/18/04 motion hearing at 6-7, Appendix, pp 103b-4b).

Thus, Plaintiff has conceded the "chilling effect" that would have ensued in this particular instance had the vice president anticipated his confidential, subjective letter, comprised of his opinions and positions regarding EMU's president, would be publicly disclosed. Having accepted this factual record and, indeed, having offered no competent evidence to the contrary, Plaintiff cannot now argue that EMU has not met its burden of showing a chilling effect on frank communications in this particular instance. It is clear from the record in this matter that the public's interest in encouraging frank communications prevails here. EMU has established – and Plaintiff has conceded – that

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[4] All references to the Appendix filed by EMU in this Court will hereafter be noted as "Appendix, p X".

[5] As explained in EMU's brief, Plaintiff sought expedited consideration of this matter before the circuit court, setting the hearing on its "motion to compel" for a mere 13 days after it served EMU with that motion. While EMU asserted the need for discovery to permit it to prepare its factual defense and provide the court with evidence by way of affidavit or testimony, Plaintiff roundly dismissed the need for any discovery whatsoever.

the letter contains the opinions and subjective views of its author, it was relied upon by the board in its deliberative process, and, most importantly, it would have been a less candid presentation of his opinions and views had the vice president expected it to be public. The important public objective of frank communications between public administrators would have been foiled here and the board's deliberative process less informed had the vice president expected the letter to be public. This diminution in the quality of information available to public officials in their decision making processes is exactly the risk the frank communications exemption is intended to avoid. One does not need to speculate that a chilling effect would have occurred in this particular instance. The circuit court record establishes that it would.

C. The Trial Court and Court of Appeals Correctly Concluded That The Public Interest In Encouraging Frank Communication Between Officials and Employees of Public Bodies Clearly Outweighs The Public Interest In Disclosure In the Particular Instance of This Case.

The Court of Appeals thoughtfully explained the high public interest in encouraging frank communications between public officials, and relatively low public interest in disclosure of the vice president's letter, in the particular circumstances of this matter:

> [T]he public has a far greater interest in ensuring that boards of public universities provide effective oversight of the administration's expenditure of public funds than knowing the opinions of one administrator about another. The Board needed more than cold and dry data to do its job, it needed the unvarnished candid opinion of insiders to make policy judgments and, particularly, to conduct sensitive investigations of top administrators. And, when a high-level administrator is asked to give his opinion of the highest ranking official in the administration, the president, his immediate superior, whose favor he needs for job security, the insider may be naturally reluctant to trust the outsider and to trust the confidentiality of the communication. Also, not unimportantly, the outside board

> member, in assessing the advisability of conducting further and more exhaustive investigations into alleged over-expenditures for the president's residence, must assess the reliability, credibility, and validity of such communications. In other words, these frank communications are essential to an outside board's ability to discharge its vital constitutional oversight function on behalf of the public. There is a substantial risk that these vital sources of candid opinions would dry up were insiders justifiably fearful that their candid appraisals would make front-page headlines. This is especially true where, as here, the Board is investigating potential misconduct of a high-ranking official and seeks the insight of other high-ranking officials who work for and side-by-side with the target of the investigation. The natural human tendency to "circle the wagons" or "play it safe," coupled with apprehension of retaliation if the written opinion is made public, would, we fear, deprive the Board of an important perspective. . .

Herald, 265 Mich App at 202-203.

Plaintiff's response to the Court of Appeal's analysis can be summarized as follows: the public interest in disclosure of this matter is high; there was no risk of a chilling effect on the content of the letter in this instance; and the future impact of disclosure this time around is not to be considered. None of these works to undermine the high public interest in encouraging candor in this situation.

First, the public interest intended by the FOIA is not served by disclosure. There is quite often a positive correlation between general public interest in a decision or course of action to be taken by a public body and the need for candor in communications regarding the decision making process. That is, as the sensitivity of a matter under consideration rises, it is more likely than not that human interest in the matter will increase as well. However, it is precisely when public officials and decisions made by our public bodies are under the magnifying glass that the need for candor in communications is the greatest. Thus, the "public interest in disclosure" for FOIA purposes must mean something other than general public curiosity. It must signal the

public's *need* for disclosure in order to engage in the democratic process and work to effect change when errors in judgment or misbehavior by public officials occurs. Where, as here, the elected public officials, vested with constitutional responsibility to manage and supervise the affairs of the institution are properly attending to those responsibilities, the public's interest in disclosure of every specific detail in communications between public officials and employees is, in fact, relatively low.[6]

The universities appearing here as amicus have done so precisely in order to address the high public interest in encouraging candor in situations such as this. The board members of the state's public universities are either elected or appointed by the governor. They typically do not hold administrative posts at their institutions and so, in that sense, are outsiders to the day to day operations of the institutions. It is critical to the effective operation of the state university governing boards that they be able to obtain the candid and unvarnished input of the institutional executive officers and administrators who manage the daily affairs of the universities. It is of serious concern to the boards appearing here that, if the Court should order that communications such as the one at issue are subject to disclosure, they will no longer have the benefit of such honest and

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[6] The Court of Appeals appreciated this distinction, noting "Also important to our decision is the uncontroverted fact that the Board acted in fulfillment, not in derogation, of its constitutional role. That is, the Board investigated and reported to the public, it did not conceal and sweep the issue under the rug. Had this been a case in which the president himself concealed documents to hide his alleged misconduct, with the complicity of the Board, then the balancing of public policy interests and the calculus of decision making would clearly weigh in favor of disclosure. But, where, as here, a board needs insiders' opinions to investigate other insiders to protect the use of public funds and, where that board honorably discharges its obligations, the public interest in nondisclosure clearly predominates. *Herald*, 265 Mich App at 204.

forthright information as they try to discharge their constitutional obligations to manage and supervise their respective institutions.

Second, Plaintiff's discounting of the chilling effect in this matter because of the vice president's purported[7] decision to retire prior to writing the letter (App at 89b) completely ignores human nature and the dynamics of interpersonal relationships, especially at universities which are, by definition, collegial organizations. Plaintiff has repeatedly referred to the vice president as a "highly respected" administrator at EMU. It is beyond reason that a senior administrator and executive officer of such high esteem would, on the eve of concluding his career in higher education administration, suddenly no longer be concerned about his reputation and legacy. Most certainly, his sensitivity to being linked, in any way, to possible scandal just as he was leaving the institution would be heightened. There is every reason to believe that his commentary to the regents would have been less candid, less forthcoming, and less reliable if he believed it might be publicly revealed after he left the university and was no longer in a position to officially respond to any criticism that might flow from that disclosure.[8]

Further, Plaintiff's attempt to minimize the chilling effect based upon the vice president's alleged retirement plans leaves the balancing test of the frank communications exemption uncertain and unmanageable. Under Plaintiff's argument, a

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[7]The record contains no competent evidence that the vice president had made and announced a decision to retire prior to writing his letter.

[8] In this era of second and third careers launched after "retirement", it is especially disingenuous for Plaintiff to point to the vice president's pending retirement from EMU to diminish the chilling effect an anticipated disclosure would have. Plausible is the possibility that the vice president may decide to market his services as a consultant in higher education administration at some future point and his candid comments on the matter at issue here, if disclosed, would be perceived as a lack of discretion on his part, thereby impeding his new career.

public employee who is close to ending his employment should not expect that his opinions and comments could be withheld from public disclosure, but the candid comments of an employee planning to stay with the public employer indefinitely would be withheld. The various scenarios and outcomes to ensue from such a rule are nonsensical.

Finally, Plaintiff's reliance on *Bradley v Saranac Schools,* 455 Mich 285 (1997) is misguided. *Bradley* addressed the specific scenario of job performance evaluations of public employees by their public employee supervisors. *Id* at 289-290. While the Court there concluded that candor and accuracy would be fostered by disclosure, not confidentiality of the job evaluations, the case is readily distinguishable. In *Bradley,* the authors of the documents in question were the supervisors, writing critically about their subordinates. *Id* The performance evaluations were a regular and mandatory part of the supervisors' job; in fact, it is reasonable that how well the public employee/supervisor was performing her job would be reflected, in part, by how thoroughly and insightfully she evaluated the performance of her subordinates. In this case, the situation is the exact opposite: a subordinate, the vice president, was asked to step out of his usual role and customary duties to speak freely regarding his superior.[9]

[9] Plaintiff's assertion – as speculative and unsupported by the record of competent evidence as it is - that the letter is "highly critical of " EMU's president does not influence this case in Plaintiff's favor. Indeed, it only serves to strengthen the conclusion that a subordinate asked to speak candidly about his superior should not have his comments opened to the public.

III. ANY PURELY FACTUAL MATERIALS CONTAINED WITHIN THE PUBLIC RECORD WERE PROPERLY INCLUDED WITHIN THE SCOPE OF THE EXEMPTION.

As discussed above and in EMU's Brief, there is no competent evidence in the record of this case that any information that is "purely factual" is present in the vice president's letter.

Even if some random factual items are contained in the letter, however, the frank communications exemption still permits withholding of the letter in its entirety. MCL 15.243(1)(m) permits withholding of communications of an advisory nature that cover "other than purely factual" materials. Thus, only that which is purely factual falls outside of the exemption. There is no allegation that the letter is purely factual and so MCL 15.243(1)(m) still applies.

In *Favors v Dep't of Corr*, 192 Mich App 131 (1992), the plaintiff made a FOIA request for a worksheet used by the DOC disciplinary committee to determine whether to award disciplinary credits to an inmate. The particular version of the worksheet requested – the "goldenrod" colored copy - included a section for committee members' written comments. *Id* at 134. With the exception of that comment section, the goldenrod copy was factual in nature, as were the remaining four copies of the worksheet.[10] *Id* Although the factual information contained in the sections of the goldenrod form other than the comments section were physically separate from the comments section and, as such, were presumably easily severable, the Court of Appeals held that the entire

[10] The Court of Appeals noted that, except for the written comments section of the goldenrod copy, all of the information on that copy also appears on the other copies of the form and that the goldenrod copy singularly contained "other than purely factual" materials specifically because of the comment section. *Id* at 135. Thus, the only logical conclusion is that the other parts of the goldenrod copy, those that were common to all five copies of the form, were factual in nature.

document fell within the frank communication exemption. *Id* at 136. The Court found the goldenrod copy in its entirety to be other than purely factual and therefore within the FOIA exemption. *Id* at 135.

In this case, the vice president's letter is overwhelmingly comprised of "other than purely factual" (i.e., nonfactual) material. Following its *in camera* review of the letter, the circuit court stated that the "letter contains substantially more opinion than fact, and the factual material is not easily severable from the overwhelming majority of the contents." (App. at 9b) The Court of Appeals clearly agreed with this characterization.

Plaintiff's focus on the obligation created by FOIA for public bodies to separate exempt (here, factual) from nonexempt (nonfactual) material is also misplaced and ignores the way people write thoughtfully about complex issues. The vice president was asked to provide his opinion and assessment of circumstances at EMU. Clearly, in doing so he would have needed to refer to certain specific facts in order to present a cogent and meaningful narrative. Moreover, the choices he made with regard to which "facts" to mention and highlight and which to leave unreferenced were, in themselves, subjective decisions influenced by his opinions and impressions. Plaintiff's view of the world would require public bodies to release "swiss cheese" – advisory documents so heavily redacted for subjective material than any pure facts disclosed are meaningless to the reader. The burden on public bodies to produce and redact these copies would be substantial but a waste of public resources, as any minimal facts disclosed would have no meaning or utility to the reader. Consideration of the whole document and its overall purpose, as adopted by the Court of Appeals in *Favors* and both lower courts in this matter, is the reasonable approach.

Finally, Plaintiff's allegation that a public body could avoid its obligations under FOIA by burying substantially factual materials in a document containing a few scattered opinions is absurd. Any public body attempting to do so would most certainly incur the sanctions provided in the FOIA. The *in camera* review by the court provided in the statute, allowing the court to evaluate whether the document is substantially fact or substantially opinion and whether any facts are reasonably severable, already provides a sufficient check and balance system to avoid this sort of abuse by public bodies.

IV. THE LETTER IN QUESTION IS NOT A PUBLIC RECORD OPEN TO INSPECTION PURSUANT TO ARTICLE 9, §23 OF THE MICHIGAN CONSTITUTION.

Two of the amicus appearing in support of Plaintiff, the Michigan Press Association ("MPA") and Michigan Association of Broadcasters ("MAB"), offer as their primary argument the notion that the letter in question, written by the Vice President of Eastern Michigan University to a board member at the request of that board member, is a public record open to inspection pursuant to art 9, §23 of the Michigan Constitution which provides, "All financial records, accountings, audit reports and other reports of public moneys shall be public records and open to inspection. A statement of all revenues and expenditures of public moneys shall be published and distributed annually, as provided by law." Const 1963, art 9, §23.

The MPA and MAB are clearly overreaching in their reliance upon this provision as a basis for disclosure of the letter. In the only published case to interpret the provision, the Court of Appeals noted that the most expeditious way to meet its manifest purpose is "to give the public access to summaries, balance sheets, and other such compilations which map out and correlate a myriad of financial transactions into a meaningful

account." *Grayson v Michigan State Bd of Accountancy,* 27 Mich App 26, 34 (1971). The Court recognized, however, that the smooth functioning of government could be impaired if Const, art 9, §23 was interpreted to require disclosure of every record of a financial transaction by a public body:

> It strains one's credulity to think that the framers of the Constitution meant to allow the public to inspect every receipt, every application for licensure and every writing evidencing a receipt or expenditure. It is totally unnecessary to give such authority to the public to achieve the purpose aforementioned and such authority could easily serve as a tool to harass governmental agencies by unreasonable demands for great volumes of individual documents. We hold that the public right to information given by article 9, §23 is best promoted, and the smooth functioning of the government best protected, by construing the words 'financial records' to require more than a receipt or document . . . .

Id at 34-35.

The MPA and MAB concede that they have not seen the letter from the Vice President. Notwithstanding their complete lack of firsthand knowledge of the contents and context of the letter, they utterly ignore the circuit court's characterization of the letter it reviewed *in camera*, to the effect that it is primarily a summary of events from the author's perspective. A letter such as this, that may refer to a financial transaction as background for the subjective comments of the author is not a compilation mapping out and correlating a myriad of financial transactions; in fact, it is not a meaningful account of any single transaction whatsoever. The letter is a narrative from the author that *possibly* may mention one or more financial transactions. Requiring any document like this that is created or retained by a public body to be open to inspection pursuant to Const, art 9, §23 would at the very least create an undue burden on public bodies and, at the worst, facilitate the very tool for harassment the *Grayson* court cautioned against.

In reaching its holding in *Grayson*, the Court of Appeals noted that there was no judicial pronouncement of the meaning of "financial records." *Grayson*, 27 Mich App at 34. It was aided by the construction given by the chief of the state's accounting division, who stated

> '. . . financial records are those records from which . . . statements and reports (audit reports, financial reports, and statements) are made up and include general and subsidiary ledgers within which summary and detail entries are made from documents, listings, and recapitulations. That documents such as payrolls, expense vouchers, purchase orders, receipts vouchers, warrants, applications for licensure and the like are not financial records and are not available to the public.'

Id

Clearly, a letter written for the stated purpose of conveying the author's thoughts and impressions of a project at the university is not a record from which a statement or report[11] is derived. There is nothing in the record to suggest that the letter provides any organized, comprehensive detail of one or more transactions. It possesses none of the characteristics of typical financial records and was a one-time subjective commentary, not a regular and continuously updated reporting as is usually the case with balance sheets, statements of accounts and the like.

The MPA and MAB's argument on this point is thoroughly implausible. Moreover, this constitutional issue was never raised by any party to this litigation in proceedings in the lower courts and has not been developed with the benefit of genuine advocacy on the issue. Prior to this Court speaking on such an important and potentially

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[11] The MPA and MAB refer to the letter as an "other report" of public money. However, a "report" is an account or announcement that is prepared, presented, or delivered, usually in formal or organized form. AMERICAN HERITAGE DICTIONARY (1979), p 1103. The record in this case does not indicate that the letter meets any of these criteria with regard to any information of a financial transaction that may be contained within it.

far reaching issue, it should be properly litigated through the courts by parties with a direct interest in the determination.

RELIEF REQUESTED

Amicus Curiae state universities respectfully request that this Court order the letter in question to be exempt from disclosure pursuant to MCL 15.243(1)(m) and affirm the decision of the Court of Appeals and circuit court.

Dated: October 13, 2005

Respectfully submitted by,

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